Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–25–1997
GOPAL SRI RAM, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
16 APRIL 1997

Civil Procedure *— Injunction — Interlocutory injunction — Lapse of — Inter partes injunction — Absence of counsel and party at hearing of application — Whether inter partes injunction order rendered ex parte by the absence — Whether injunction lapsed after two weeks — Rules of the High Court 1980 O 29 r 1(2B)*

Civil Procedure *— Contempt of court — Contravention of prohibitory injunction — Whether interlocutory injunction had lapsed before the alleged act of contempt — Whether excuse that notice of hearing of injunction was not received was relevant consideration in contempt proceedings — Rules of the High Court 1980 O 29 r 1(2B)*

Civil Procedure *— Injunction — Interlocutory injunction, discharge of — Injunction ensured smooth and effective working of consent judgment — Whether consent judgment in substantive action discharges interlocutory injunction*

Civil Procedure *— Contempt of court — Contravention of prohibitory injunction — Discovery procedure invoked against third party prior to motion for committal — Contemnor was offered opportunity to cross-examine third party at motion for committal — Whether contemnor deprived of essential justice*

Civil Procedure *— Contempt of court — Burden of proof — Whether there had been a reversal of the burden*

Civil Procedure *— Contempt of court — Sentence — Principles applied — Whether custodial sentence excessive*

The appellant left the firm in which he practised as an advocate and solicitor in partnership with the respondents. After they parted company, the respondents complained, inter alia, that the appellant continued to interfere with the affairs of the new firm. The respondents applied for an interlocutory injunction which included an order seeking to restrain the appellant from acting in a manner detrimental to the partnership. On 2 December 1995, when the summons came for hearing, neither the appellant nor his counsel appeared. The learned judge granted the injunction ('the injunction').

On 11 January 1996, the parties entered into a consent order in the substantive action to settle the affairs of the partnership.

On 27 June 1996, a client of the respondents who was once attended to by the appellant ('the third party'), wrote to the respondents stating that 'after due consultation with the relevant person in charge of the ... matter', the amount owing to the respondents had been reduced to only RM58,000. The third party, when examined on oath, admitted that the person referred to in the letter was the appellant. This viva voce examination was conducted in the absence of the appellant.

A The appellant complained about the examination at the hearing of the substantive motion for committal filed by the respondents. At the committal, apart from filing an affidavit in answer to the charge against him, the appellant did not choose to give oral evidence. He also declined the judge's offer to have the third party produced for B further cross-examination. After hearing arguments, the judge found the appellant guilty of contempt and sentenced the appellant to one month imprisonment. The appellant appealed.

Counsel for the appellant submitted that: (a) the injunction had lapsed before the alleged act of contempt; and that the injunction C was bad because notice that the summons would be heard on 2 December 1995 was not received by the appellant's solicitors until 4 December 1995; (b) the consent judgment had the effect of discharging the injunction and therefore the injunction had ceased to exist before the alleged breach; (c) the contempt proceedings were fundamentally flawed because there had been a breach of natural D justice; (d) the evidence led by the respondents fell short of the standard of proof required to establish the charge of contempt and the judge reversed the burden by presuming that the appellant was guilty of contempt; and (e) the custodial sentence imposed was excessive.

E **Held,** dismissing the appeal:

(1) Order 29 r 1(2B) of the Rules of the High Court 1980 applies only to injunction granted upon an ex parte application and does not limit the life-span of an injunction granted on an inter partes summons or motion.

F In this case, the respondents' summons seeking the injunction was inter partes in nature. It was not headed as an ex parte summons. It was served on the appellant's solicitors. The absence of the appellant or his counsel at the hearing of the summons did not render ex parte the order made upon it by the learned judge.

G The argument that the injunction was bad because the notice of its hearing was not received by the appellant's solicitors before 2 December 1995 was not supported by the correspondence set out in the record of appeal. Moreover, this was an entirely irrelevant consideration in contempt proceedings. The appellant's H duty was one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt (see pp 481E–F, H–I and 482A–D); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 followed.

I (2) It is not every case in which a final disposal of the action would result in an interlocutory injunction being discharged automatically and without more. Dismissal of an action apart, it depends upon the facts and circumstances of each case whether an interlocutory injunction survives final judgment. A consent

judgment is not a judgment of the court pronounced on merits but an agreement reached between the parties to an action which the court records as an order. The interlocutory injunction granted on 2 December 1995 ensured the smooth and effective working of the agreement and was therefore a necessary adjunct to the consent judgment. This being the case, the consent judgment did not have the effect of discharging the injunction (see p 483C–E, F–G, I).

(3) The discovery procedure could be invoked against a third party in order to ascertain the identity of the real wrongdoer. Thus, the respondents were well within their procedural rights to have the third party be brought before the court and have his evidence recorded.

Any defect in procedure, which did not exist in this case, was certainly remedied when the trial judge offered the appellant the opportunity to cross-examine the third party. Having declined the offer, it did not lie in his mouth to argue that he was deprived of essential justice by the procedure adopted in securing the third party's evidence (see p 484C, G, I and 485A–B); *Norwich Pharmacal Co & Ors v Customs and Excise Commissioners* [1974] AC 133 followed.

(4) There was no misdirection on the judge's part on the question of burden of proof. The passage in the judgment relied upon by counsel to show that there had been a reversal of the burden appeared in the context of punishment and not in reference to the proof of guilt. The evidence when considered in its totality established, beyond reasonable doubt, the guilt of the appellant on the charge of the contempt in question (see p 485E–G).

(5) In sentencing, subject to questions of policy, each case must be dealt with according to its own facts. The principle that a set of facts is not precedent for another applies with equal force in matters of punishment. The appellant was a member of the Bar and more than anyone else, should respect and obey an injunction issued by the court. The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would-be violators of injunctions. The argument that the appellant ought not receive a more severe punishment for an earlier breach was entirely irrelevant. The judge, when considering the punishment, took into account all relevant circumstances. It had not been demonstrated that he erred either in principle or that he had passed a sentence that was manifestly excessive (see p 486B–E).

[Bahasa Malaysia summary

Perayu telah meninggalkan firma di mana dia membuka praktik guaman sebagai seorang peguambela dan peguamcara dalam perkongsian dengan penentang-penentang. Selepas berpisah, penentang-penentang membuat aduan, antara lain, bahawa perayu

terus campur tangan dalam urusan firma baru. Penentang-penentang memohon suatu injunksi interlokutori yang termasuk satu perintah untuk menghalang perayu daripada bertindak dalam cara yang menjejaskan perkongsian. Pada 2 Disember 1995, apabila saman dibicarakan, baik perayu mahupun peguamnya tidak hadir. Hakim yang arif membenarkan injunksi itu ('injunksi tersebut').

Pada 11 Januari 1996, pihak-pihak mengikat suatu perintah persetujuan dalam tindakan substantif bagi menyelesaikan urusan perkongsian.

Pada 27 Jun 1996, seorang klien penentang-penentang yang pernah diwakili oleh perayu ('pihak ketiga'), telah menulis kepada penentang-penentang dengan menyatakan bahawa 'selepas rundingan dengan orang yang relevan yang bertanggungjawab atas ... perkara ini', amaun yang terhutang kepada penentang-penentang dikurangkan kepada hanya RM58,000. Pihak ketiga, apabila diperiksa atas ikrar, mengaku bahawa orang yang dirujuk dalam surat itu adalah perayu. Pemeriksaan viva voce ini dilakukan dalam ketiadaan perayu.

Perayu mengadu tentang pemeriksaan di pembicaraan usul substantif untuk komital yang difailkan oleh penentang-penentang. Di komital, selain daripada memfailkan afidavit menjawab pertuduhan terhadapnya, perayu tidak memilih untuk memberi keterangan lisan. Dia juga enggan menerima tawaran hakim untuk mengemukakan pihak ketiga untuk pemeriksaan balas. Selepas mendengar hujah, hakim mendapati perayu bersalah atas penghinaan dan menghukum perayu kepada pemenjaraan selama sebulan. Perayu membuat rayuan.

Peguam perayu berhujah bahawa: (a) injunksi tersebut telah luput sebelum perbuatan penghinaan yang dikatakan; dan bahawa injunksi tersebut adalah tidak elok kerana notis bahawa saman akan dibicarakan pada 2 Disember 1995 tidak diterima oleh peguamcara perayu sehingga 4 Disember 1995; (b) penghakiman persetujuan mempunyai kesan melepaskan injunksi tersebut dan oleh itu injunksi tersebut telah tidak wujud sebelum keingkaran yang dikatakan; (c) prosiding penghinaan adalah cacat pada dasarnya sebab terdapat kemungkiran keadilan asasi; (d) keterangan yang dikemukakan oleh penentang-penentang tidak memenuhi darjah membukti yang diperlukan bagi membuktikan pertuduhan penghinaan dan hakim telah mengakas beban dengan membuat anggapan bahawa perayu bersalah atas penghinaan; dan (e) hukum tahanan yang dikenakan adalah melampau.

Diputuskan, menolak rayuan:

(1) Aturan 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 terpakai hanya kepada injunksi yang diberikan atas suatu permohonan ex parte dan tidak menghadkan tempoh hidup injunksi yang diberikan untuk saman atau usul inter partes.

Dalam kes ini, saman penentang-penentang yang meminta injunksi tersebut adalah bersifat inter partes. Ia tidak bertajuk

saman ex parte. Ia disampaikan kepada peguamcara perayu. Ketiadaan perayu atau peguamnya di pembicaraan saman tidak menyebabkan perintah yang dibuat atasnya oleh hakim menjadi ex parte.

Hujah bahawa injunksi tersebut adalah tidak elok kerana notis tentang pembicaraannya tidak diterima oleh peguamcara perayu pada 2 Disember 1995 tidak disokong oleh surat-menyurat yang dinyatakan dalam rekod rayuan. Tambahan lagi, ini adalah suatu pertimbangan yang tidak relevan pada keseluruhannya dalam prosiding penghinaan. Kewajipan perayu adalah untuk mematuhi sehingga suatu masa apabila perintah diketepikan atau diubah. Sesiapa yang gagal mematuhi suatu perintah mahkamah menanggung risiko didapati bersalah atas penghinaan (lihat ms 481E–F, H–I dan 482A–D); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 diikut.

(2) Bukanlah dalam setiap kes di mana penyelesaian muktamad tindakan akan mengakibatkan pelepasan injunksi tersebut secara automatik dan tidak lebih dari itu. Selain daripada penolakan suatu tindakan, ia bergantung kepada fakta-fakta dan keadaan setiap kes sama ada suatu injunksi terselamat daripada penghakiman muktamad. Suatu penghakiman persetujuan bukanlah penghakiman mahkamah yang diisytiharkan atas merit tetapi suatu perjanjian yang dicapai antara pihak-pihak kepada suatu tindakan yang direkodkan oleh mahkamah sebagai suatu perintah. Injunksi interlokutori yang diberikan pada 2 Disember 1995 memastikan pelaksanaan perjanjian yang lancar dan berkesan dan oleh itu adalah suatu yang perlu kepada penghakiman persetujuan. Dalam keadaan ini, penghakiman persetujuan tidak mempunyai kesan melepaskan injunksi tersebut (lihat ms 483C–E, F–I).

(3) Prosedur penzahiran boleh digunakan terhadap suatu pihak ketiga bagi menentukan identiti orang yang bersalah sebenar. Maka, penentang-penentang bertindak dalam lingkungan hak prosedur mereka untuk membawa pihak ketiga ke mahkamah dan merekodkan keterangannya.

Sebarang kecacatan dalam prosedur, yang tidak wujud dalam kes ini, memang dibetulkan apabila hakim perbicaraan menawarkan peluang untuk memeriksa balas pihak ketiga kepada perayu. Memandangkan perayu telah menolak tawaran, dia tidak boleh berhujah bahawa dia dilucutkan keadilan oleh prosedur yang diterima-pakai dalam menjamin keterangan pihak ketiga (lihat ms 484C, G, I dan 485A–B); *Norwich Pharmacal Co & Ors v Customs and Excise Commissioners* [1974] AC 133 diikut.

(4) Tiada salah arah pada pihak hakim atas persoalan beban membukti. Petikan dalam penghakiman yang peguam bergantung kepada bagi menunjukkan terdapat pengakasan beban muncul dalam konteks hukuman dan bukan dalam rujukan kepada bukti kesalahan. Keterangan apabila dipertimbangkan secara keseluruhan membuktikan, melampaui keraguan munasabah,

kesalahan perayu atas pertuduhan penghinaan berkenaan (lihat ms 485E–G).

(5) Dalam menjatuhkan hukuman, tertakluk kepada persoalan polisi, setiap kes mesti diselesaikan mengikut fakta-fakta tersendiri. Prinsip bahawa suatu set fakta tidak merupakan duluan untuk yang satu lagi terpakai dengan daya yang sama dalam perkara hukuman. Perayu merupakan seorang ahli Badan Peguam dan lebih-lebih lagi patut menghormati dan mematuhi suatu injunksi yang dikeluarkan oleh mahkamah. Hukuman yang dijatuhkan seharusnya, selain daripada membayangkan keseriusan kesalahan tertentu, bertindak sebagai pencegahan kepada bakal pelanggar injunksi. Hujah bahawa perayu tidak patut menerima hukuman yang lebih tegas atas kemungkiran yang lebih awal adalah tidak relevan. Ketika mempertimbangkan hukuman, hakim telah mengambil kira semua keadaan yang relevan. Ia tidak dibuktikan bahawa beliau telah melakukan kesilapan sama ada dalam prinsip atau bahawa beliau telah menjatuhkan hukuman yang melampau (lihat ms 486B–E).]

Notes

For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1564–1611.

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

Cases referred to

Bramblevale Ltd, Re [1970] Ch 128 (refd)

Norwich Pharmacal Co & Ors v Customs and Excise Commissioners [1974] AC 133 (folld)

Wee Choo Keong v MBf Holdings Bhd & Anor [1993] 2 MLJ 217 (folld)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2B)

Appeal from: Civil Suit No S5–22–205–95 (High Court, Kuala Lumpur)

Christopher Fernando (*Haresh Mahadevan* and *P Uthayakumar* with him) (*Aris Rizal Christopher Fernando & Co*) for the appellant.

BS Sidhu (*Cantius Leo Cameons* and *David Churme* with him) (*Chin & Co*) for the respondents.

Gopal Sri Ram JCA (delivering the judgment of the court):

Introduction

This appeal arises from the decision of the High Court finding the appellant guilty of contempt for the breach of an injunction and sentencing him to

one month's imprisonment. On 31 January 1997, this court granted the appellant bail pending appeal in the sum of RM200,000 in two sureties and ordered him to surrender his international and restricted passports. Since this matter involved the liberty of a citizen, we directed an early hearing of the appeal.

Facts and background

The appellant is a member of the legal profession. So are the respondents. All of them were at one point in time members of the Judicial and Legal Service. They resigned and had themselves admitted to the Bar. They came together and formed a firm in which they practised as advocates and solicitors. Initially, they enjoyed an amicable relationship. Later, it turned sour. In the end, they decided to part company. The appellant left the firm. The respondents decided to stay on together and practise law. The separation of these former friends was bitter and acrimonious. They hurled allegations against each other. It culminated in a suit being filed by the respondents against the appellant. One of the complaints made by the respondents was that the appellant continued to interfere with the affairs of the new firm. The respondents therefore applied for an injunction. The application was made by a summons taken out on 4 August 1995. It was made returnable inter partes on 1 September 1995. The relief sought included an order seeking to restrain the appellant acting in a manner detrimental to the partnership.

When the respondents' summons came on for hearing before the learned judge on 1 September 1995, he indicated that the interests of the parties would be best served by an early trial of the action. This the learned judge was well entitled to do. The summons was accordingly adjourned pending the disposal of the suit.

Matters must, however, have come to a head because in early December 1995 the respondents took steps to restore their summons for urgent hearing. On 1 December 1995, the court issued notice to both parties to appear on the summons the very next day. On 2 December, when the summons came on for hearing, counsel for the respondents was present. However, neither the appellant nor his counsel appeared. The reason for their absence is a matter which we will advert to when we come to deal with the arguments advanced by the appellant before us. Suffice to say that it was in these circumstances that the learned judge made an order in terms of the respondents' summons.

On 11 January 1996, the parties entered into a consent order which contained the following terms:

(1) The defendant's partnership with the plaintiffs ceased as of 31 July 1995 and the firm shall be continued by the first and second plaintiffs as of that date.

(2) The defendant's name shall be removed from the firm's name of Yusuf Lee Pathma & Marbeck within three months from the date of this Order.

(3) That Bala Subramaniam s/o Karrupiah of Messrs SM Loh & Bala, Certified Public Accountants be hereby appointed the accountant to enquire, inspect and determine the assets, liabilities, dealings, transactions and the value of all files as at 31 July 1995 and thereafter ascertain the defendant's and plaintiffs' entitlement in respect thereof and for such purposes:

(a) the defendant shall hand to the firm through the accountant within 14 days from the date hereof all the properties and assets of the firm including a list of files in his custody;

(b) the plaintiffs shall enable the accountant to have access to all the files and documents that are now in their custody; and

(c) the Accountant shall complete the accounts within six months from the date of this Order.

(4) That upon ascertainment of their respective entitlement each party shall settle the amounts due to the other as the case may be within three months from the delivery of the accounts to all the parties subject always to para 7 hereof.

(5) The remuneration and costs of the accountant shall be paid from the assets of the partnership as of 31 July 1995 and shall have priority over all other payments.

(6) The defendant shall with notice of appointment be entitled to have access to the premises of the firm to enable him to remove his personal belongings, effects and files.

(7) The parties hereto and the said accountant shall be at liberty to apply.

(8) That the defendant's counterclaim be struck off.

(9) That there be no order as to costs.

On 28 November 1996, the respondents obtained leave to commit the appellant for alleged breach of the injunction. They then filed their substantive motion. The facts on which the respondents' application was based arose in this way.

The appellant, while still in partnership with the respondents, had attended to a company (of which one Dato' Elli bin Hj Mohd Tahir was a director) in respect of a conveyancing transaction. A bill had been sent by the firm to Dato' Elli's company which made part payment. The balance outstanding on the bill was almost RM270,000.

On 27 June 1996, the company wrote a letter to the respondents. It was signed by Dato' Elli. It alleged that 'after due consultation with the relevant person in charge of the ... matter', the amount payable to the respondents was only RM58,000. The appellants wanted to discover the identity of the 'relevant person' referred to by Dato' Elli. They wrote to him asking for particulars. But there was no response from Dato' Elli. So, they took out a summons to have Dato' Elli cross-examined on oath before the judge. The judge granted the order. Dato' Elli was then produced before the judge on 15 November 1996 and questioned by the respondents' counsel. He admitted that the person referred to in the letter was the appellant. The relevant portion of his *viva voce* examination reads as follows:

> The relevant person is En Lee Lim Huat. Encik Lee called me sometime in April 1996 and told me that the figure was not correct. ... He gave no reason why this amount was different from that in the original bill. I did not ask the reasons. I know that I have to pay to this firm of Messrs Yusuf Khan & Pathmanathan. At that time, I heard that En Lee Lim Huat had left the firm of Messrs Yusuf Khan & Pathmanathan. I never queried the original bill.

Now, the *viva voce* examination of Dato' Elli was conducted in the absence of the appellant. The appellant was dissatisfied with the procedure adopted. He complained about it before the learned judge at the hearing of the substantive motion for committal. He made it a ground of appeal before us. We will deal with his complaint later in this judgment.

It was only after Dato' Elli's examination that the respondents initiated contempt proceedings. They applied for a certified copy of the note of Dato' Elli's evidence recorded by the judge. They served it on the appellant together with the other cause papers. The appellant filed an affidavit in answer to the charge against him. However, he did not choose to give oral evidence. Neither did he apply to have Dato' Elli produced for further cross-examination. The judge offered him that opportunity. But he declined the offer.

After hearing arguments, the learned judge found the appellant guilty of contempt for having breached the terms of the injunction. He sentenced the appellant to serve a month in prison. The appellant appealed against these findings.

The appeal came before us for hearing on 17 February 1997. However, upon application made by counsel for the appellant, it was adjourned to 21 March 1997. It was heard on that date and adjourned for continued hearing on 3 April 1997. At the conclusion of arguments, we dismissed the appeal and affirmed the sentence passed by the High Court. However, we made an order extending the bail already granted upon the same terms until the hearing and disposal of the application for leave to appeal which the appellant proposes to make to the Federal Court.

The submissions of counsel

In support of the appeal, En Fernando of counsel for the appellant submitted that his client ought not to have been found guilty of contempt because:

> the injunction in question had lapsed before the alleged act of contempt, and so there was no order capable of disobedience;
>
> the injunction had merged into the consent judgment that had been entered into by the parties and had therefore ceased to exist well before the alleged breach;
>
> the contempt proceedings were fundamentally flawed because there had been a breach of the rules of natural justice in that Dato' Elli's evidence had been taken ex parte the appellant and then relied upon to found the conviction; and

A the evidence led by the respondents fell short of the standard of proof required to establish the charge of contempt. On the other hand, the learned judge reversed the burden by presuming that the appellant was guilty of contempt.

We will now deal with each of these arguments in turn.

B

Lapse of injunction

The submissions advanced by counsel in support of the first ground may be summarized as follows.

C The injunction, the breach of which was alleged, was granted ex parte. Accordingly, by reason of the provisions of O 29 r 1(2B) of the Rules of the High Court 1980, it lapsed at the end of two weeks from the date of its grant. In other words, the injunction granted on 2 December 1995 lapsed on 16 December 1995. The alleged breach occurred in April 1996. There was no injunction in force at that time. Consequently, there D was no contempt.

Order 29 r 1(2B), which is the fulcrum upon which the submissions of counsel turn, reads as follows:

> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse at the end of two E weeks from the date on which it is granted.

The language in which the rule has been cast makes it plain that it applies only to injunctions granted upon an ex parte application. The Rule does not limit the life-span of an injunction granted on an inter partes summons or motion. Such an injunction will usually continue to remain in force F until further order or until the disposal of the action in which it was obtained.

Thus, in order to resolve the issue raised by counsel before this court, it is necessary first to determine the nature of the application upon which the respondents obtained their injunction in this case. If it was an ex parte application, then the appellant would be quite right in his contention. If, G on the other hand, it was an inter partes application, then r 1(2B) would have no relevance and the submission made to us would lack merit.

As earlier observed, the respondents' summons taken out on 4 August 1995 seeking the injunction was inter partes in nature. It was not headed as an ex parte summons. It was served on the appellant's solicitors. The H absence of the appellant or his counsel at the hearing of the summons on 2 December 1995 did not render ex parte the order made upon it by the judge. Order 29 r 1(2B), therefore, had no relevance to the present case. Hence, the argument of counsel that the injunction had lapsed by reason of this rule of court had no merit whatsoever.

I Counsel for the appellant also contended that the injunction was bad because notice that the summons would be heard on 2 December 1995 was not received by his solicitors until 4 December 1995. However, the correspondence set out in the record of appeal provided to us did not

appear to support counsel's argument. The notice of hearing issued by the High Court was addressed to the solicitors on either side at their respective Bar Council boxes, which is the usual method by which notice is given to parties. If, as is the case, the respondents' solicitors received the notice and were able to present themselves, it is reasonable to expect the same of the appellant's solicitors.

In any event, the argument, while it may be germane in proceedings brought to set aside the injunction of 2 December 1995, was an entirely irrelevant consideration in contempt proceedings. The point is quite unarguable in that it is concluded by binding authority against the appellant. We refer, of course, to the decision of the Supreme Court in *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 at p 220, where Abdul Hamid Omar LP said:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

There is, accordingly, no merit in the first argument advanced by the appellant in support of his appeal.

Discharge of the injunction

In support of his second argument, counsel for the appellant relied upon the following passage at p 25 of the work entitled *Interlocutory Injunctions* (1st Ed) by Tan Woon Tiang and Koh Kok Wah which sets out *some* of the circumstances in which an interlocutory injunction may be discharged:

> An interlocutory injunction may also be discharged if the plaintiff fails to prosecute the substantive action diligently after obtaining the injunction (see *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1990] 3 MLJ 481; *Greek City Ltd v Demetriou* [1983] 2 All ER 921; *Town and County Building Society v Daisystar* (1989) 139 New LJ 1563). An interlocutory injunction will be automatically discharged if the substantive action is discontinued as an interlocutory injunction is not a separate cause of action by itself. *An interlocutory injunction is similarly discharged once judgment is given in the substantive action after the trial and no permanent injunction is granted.* If the defendant makes payment into court in full satisfaction of the plaintiff's claim, the interlocutory injunction is discharged if the plaintiff accepts the payment into court (see *Hargreaves Construction (Lineside) Ltd v Williams* [1982] The Times, 3 July). (Emphasis added.)

Counsel then referred us to the consent judgment entered on 11 January 1996. He drew attention to the absence of a permanent injunction therein. He submitted that by reason of the suit having been concluded by the consent judgment, no permanent injunction having been agreed to, the interlocutory injunction granted on 2 December 1995 had been discharged with effect from the date of the consent judgment. Therefore, when the alleged breach of it occurred, the injunction was not extant.

A With respect, we found ourselves unable to agree with those submissions. In our judgment, the proposition stated by the learned authors of the work on *Interlocutory Injunctions* — to which we lent emphasis in the passage quoted a moment ago — apart from being unsupported by authority, goes too far. The true principle is that which appears in *Kerr on Injunctions* (6th Ed) at p 663 and reads as follows:

B

> If the action is dismissed, the injunction is ipso facto discharged. A motion or order for its dissolution is not necessary. But the dismissal of the action does not prevent the plaintiff from bringing another for the same purpose under a different state of circumstances, or upon new facts.

C Thus, it is not every case in which a final disposal of the action would result in an interlocutory injunction being discharged automatically and without more. Dismissal of an action apart, it depends upon the facts and circumstances of each case whether an interlocutory injunction survives final judgment.

D In the present instance, we are not dealing with a judgment of the court pronounced on merits. Here, the parties entered into a consent judgment. A consent judgment is in truth an agreement reached between the parties to an action which the court records as an order. As in the case of any other agreement, the primary function of a court is to ascertain the true intention of the parties.

E When read as a whole, what the parties to the present litigation intended was that each side should go their separate ways. Paragraphs 1, 2 and 6 are clearly indicative of such an intention. The parties also intended that their rights in the former partnership be determined by the taking of accounts. It is necessary, indeed imperative, for the smooth F working of the agreement embodied in the consent judgment that the appellant does not interfere with the respondents' continued running of the firm under a new name and style. And the parties must have so intended. The interlocutory injunction granted on 2 December 1995 ensures the smooth and effective working of the agreement reached by the parties and is therefore a necessary adjunct to the consent judgment.

G That the approach we have adopted does not depart from settled jurisprudence is evidenced by the following passage appearing at p 81 of *Law and Practice of Compromise* (4th Ed) by David Foskett:

> In addition to problems caused by imprecise drafting, parties may omit to include in their agreement a term which is necessary to render it effectual or H complete. In these circumstances, the court will be prepared to imply such term or terms as may be necessary to render the agreement effective or complete in the manner in which the parties are presumed to have intended. The court cannot, however, re-write the parties' agreement, a principle sometimes overlooked by those contending for the existence of an implied term.

I For these reasons, we are of the view that the consent judgment did not have the effect of discharging the injunction. We therefore reject the second argument advanced by counsel in support of the appeal.

Deprivation of essential justice

The appellant's third argument relates to the way in which Dato' Elli's evidence was obtained. His complaint was twofold. First, he said that the procedure resorted to is non-existent. Second, he said that he ought to have been given notice of the summons under which Dato' Elli was brought before the court and his evidence recorded. He would then have had the opportunity to cross-examine Dato' Elli. The appellants however deprived him of this. We will take each of these in turn.

First, the complaint about the procedure adopted. In *Norwich Pharmacal Co & Ors v Customs and Excise Commissioners* [1974] AC 133, the House of Lords held that the discovery procedure could be invoked against a third party in order to ascertain the identity of the real wrongdoer. Lord Reid in his speech (at p 175) described as very reasonable the principle:

> ... that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.
>
> I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability.

So here. Dato' Elli had knowledge of the identity of the person referred to in his letter. The respondents wished to discover this fact. But Dato' Elli was unwilling to co-operate. He refused to answer the respondents' letters. The respondents were entitled to obtain the information from him. We therefore agree with En Sidhu of counsel for the respondents that his clients were well within their procedural rights to do as they did. Accordingly, we are satisfied that there is no merit in the first complaint.

As far as the second complaint is concerned, our attention was drawn by counsel for the respondents to that part of the learned judge's judgment which reads as follows:

> The defendant at the time when he filed the affidavit knew of the evidence given in court by Dato' Elli. He had the golden opportunity of applying to the court to examine Dato' Elli in court. For some reason, he did not make use of that opportunity despite a reminder by the court that he could do so.

It is thus clear that the learned judge offered the appellant every opportunity to cross-examine Dato' Elli. Having declined the offer, it does not lie in his

A mouth to argue as he now seeks to do. Any defect in procedure (and we hasten to add that there was none) was certainly remedied by the order for further cross-examination which the learned judge was prepared to grant. It is abundantly clear that the appellant had not been deprived of essential justice by the procedure adopted in securing Dato' Elli's evidence. In our
B judgment, there is no merit in the third argument advanced by the appellant.

Case not made out

Encik Fernando submitted that the learned judge ought to have held that the respondents had not made out a case against the appellant. It was also
C submitted that the judge had fallen into error in presuming the appellant's guilt, thereby reversing the burden of proof. Counsel referred us to the judgment of Lord Denning MR in *Re Bramblevale Ltd* [1970] Ch 128. The Master of the Rolls there said (at p 137):

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-
D honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

E Having carefully scrutinized the judgment of the learned judge, we are of the view that there was no misdirection on his part on the question of proof. The passage in the judgment relied upon by counsel to show that there had been a reversal of the burden appears in the context of punishment and not in reference to the proof of guilt. In fact, it appears after the passage in which the learned judge expressed satisfaction with the appellant's
F guilt. The judgment reveals that the judge applied the correct test when he concluded that the appellant had intentionally breached the terms of the injunction.

It must be said in fairness to the learned judge that he carried out a careful examination of the evidence before him. We are entirely satisfied
G with his appreciation of the evidence and with the inferences he drew therefrom. The evidence when considered in its totality establishes, beyond a reasonable doubt, the guilt of the appellant on the charge of the contempt in question. We therefore reject the fourth argument raised by counsel in support of the appeal.

H *Sentence*

It was argued by counsel that the sentence of imprisonment imposed by the learned judge was excessive in the circumstances of the case. Our attention was drawn to the fact that the appellant had been convicted of
I another breach that had occurred later in point of time to the breach which is the subject matter of the present appeal. In respect of that latter breach, he had merely been fined. The appellant ought not, it was argued, to receive a more severe punishment for an earlier breach.

We are mindful of these and other matters raised by counsel in support of the appeal against sentence. We have also given careful consideration to the authorities cited by him upon this part of the case. However, it is axiomatic that when it comes to sentence, subject to questions of policy, each case must be dealt with according to its own facts. It is therefore quite idle to suggest that because a defendant in another case received a lighter punishment, the appellant before us should also receive a like sentence. The principle that one set of facts is not precedent for another applies with equal force in matters of punishment.

We are here not dealing with the case of a layman accused of breaching an injunction. The appellant is a member of the Bar. As such he, more than anyone else, should respect and obey an injunction issued by the court. The dignity of the judicial arm of Government will surely be eroded if orders of a court are honoured more in their breach than observance by members of the Bar. The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would-be violators of injunctions. We therefore reject the argument that this was an earlier offence as being entirely irrelevant.

The learned judge when considering the punishment to be imposed took into account all relevant circumstances. It has not been demonstrated that he erred either in principle or that he had passed a sentence that was manifestly excessive. On the other hand, taking into account all the circumstances of the case, we find the sentence to be extremely lenient. Had we heard the matter at first instance, we would have been disposed to passing a longer term of imprisonment.

Conclusion

For the reasons given, we came to the conclusion that the appeal had no merit and dismissed it. The orders made by the High Court were affirmed. The appellant was ordered to pay to the respondents the taxed costs of this appeal. The security paid by him into court was ordered to be paid out to account of taxed costs.

Appeal dismissed.

Reported by Ooi May Ling